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Total Number of Pages in This Submission	10	Attorney Docket Number	TN-2239
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Remarks

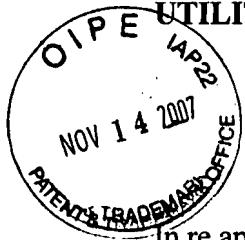
SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT			
Firm	Black & Decker Inc.		
Signature			
Printed Name	Adan Ayala, Esq.		
Date	November 12, 2007	Reg. No.	38,373

CERTIFICATE OF TRANSMISSION/MAILING

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below.

Signature			
Typed or printed name	Adan Ayala, Esq.	Date	November 12, 2007

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UTILITY PATENT

B&D No. TN2239

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES

In re application of: **Frederick R. BEAN et al.**

Serial No.: **10/054,257**

Examiner: **P. Nguyen**

Filed: **January 22, 2002**

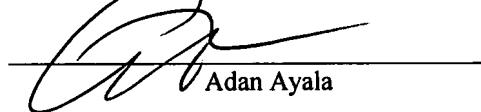
Group Art Unit: **3724**

For: **MITER SAW**

Assistant Commissioner for Patents
Washington, DC 20231

APPEAL BRIEF

I, Adan Ayala, Reg. No. 38,373, certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed to the Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on 10-12-07



Adan Ayala

Dear Sir:

I. INTRODUCTION

A non-final Office Action was mailed on June 26, 2007. In response to such Office Action, a Notice of Appeal and a Pre-Appeal Brief Request for Review were filed on September 14, 2007. The Notice of the Panel Decision from the Pre-Appeal Brief Review was mailed on October 19, 2007. The present appeal is being timely filed.

II. REAL PARTY IN INTEREST

The real party in interest in the present case is Black & Decker Inc. An assignment transferring all rights to the present application and resulting patents was filed in the priority application. The assignment can be found at Reel 012467, Frame 0732.

III. RELATED APPEALS AND INTERFERENCES

No other appeals or interferences related to the present case are currently pending.

IV. STATUS OF CLAIMS

Claims 1-7, 9-10 and 13-16 are currently pending in the present application. Claims 8 and 11-12 have been canceled. Claims 1-7 and 9-10 are withdrawn.

Claim 13 is rejected and presently appealed.

V. STATUS OF AMENDMENTS

No amendments have been filed subsequent to the non-final office action.

VI. SUMMARY OF CLAIMED SUBJECT MATTER

Pursuant to 37 CFR § 41.37 and MPEP § 1206, Applicants/appellant hereby provide a concise explanation of the inventions defined in the claims involved in the present appeal. This explanation refer to the specification by page and line number and to the drawings, as required by the CFR and the MPEP rules. However, the following explanation only refers to the embodiments disclosed in the specification and does not discuss alternative mechanisms that would be covered by the claims. Accordingly, the following explanation should not be used to limit the scope of the claims.

Independent Claim 13 calls for a chop saw 10 comprising a base assembly 11, and a saw assembly 30 pivotably attached to the base assembly 11. Spec., p. 4, lns. 1-2. The saw assembly

30 comprises an upper blade guard 31. Spec., p. 4, ln. 19. The saw assembly also comprises a plate 70 rotatably attached to the upper blade guard 31, a lower blade guard 32 rotatably attached to the plate 70, and a screw 73 engaging the upper blade guard 31 for fixing the plate 70. Spec., p. 9, lns. 19-22 & p. 10, lns. 4-6.

At least one of the upper blade guard 31 and plate 70 has a first tab 71A disposed near the screw 73 and extending outwardly and substantially perpendicularly to the at least one of the upper blade guard 31 and plate 70, where the first tab 71A extends from the at least one of the upper blade guard 31 and plate 70 a first distance. FIGS. 10-11. The screw 73 is required to be moved a second distance longer than the first distance in order to pivot the plate 70 so that the lower blade guard 32 contacts the screw 73 upon rotation of the lower blade guard 32, wherein the lower blade guard 32 contacts the screw 73 upon rotation of the lower blade guard 32 after the screw 73 has been moved the second distance. Spec., p. 10, lns. 7-9.

VII. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Whether Claim 13 is unpatentable under 35 USC § 103(a) over US Patent No. 5,778,747 (“Chen”) in view of US Patent No. 5,957,021 (“Meredith”).

VIII. ARGUMENT

Claim 13 is Patentable over the Chen/Meredith Combination.

The Board should reverse the Examiner’s improper final rejection of Claim 13 under 35 USC § 103 as the Chen/Meredith combination do not disclose all the claimed elements.

As admitted by the Examiner, Chen does not disclose the claimed first tab. The Examiner relies on Meredith to provide such first tab. However, Claim 13 requires more than just a first tab.

Claim 13 also requires that the lower blade guard can contact the screw upon rotation of the lower blade guard once the screw is moved to clear the first tab. As shown in FIG. 11 of Meredith, lower blade guard 42 cannot contact screw 69 regardless of the screw's position. Chen is necessarily silent on such feature as it does not have the first tab.

By contradistinction, Claim 13 requires "that the lower blade guard contacts the screw upon rotation of the lower blade guard, wherein the lower blade guard contacts the screw upon rotation of the lower blade guard after the screw has been moved the second distance." Being that such result is not taught or suggested by Chen and/or Meredith, the Chen/Meredith combination cannot render unpatentable Claim 13. Therefore, the rejection based on Chen/Meredith should be reversed.

The Examiner argues that, because "it is well known the [sic] art that the plate and the lower guard have a small tolerance," it would be known that a screw moved a second distance would be contacted by the guard. This ignores the fact that the Examiner has not shown how the Meredith screw, which is not anywhere near the lower guard, would contact the lower guard.

Furthermore, none of the prior cited by the Examiner shows or discloses a small tolerance between the plate and the lower guard. For example, Meredith, US Patent Nos. 6,431,042, 6,476,206, etc. show substantial separation between the plate and the lower guard, i.e., the

opposite of the Examiner's allegations.¹ Accordingly, the Examiner cannot modify the references as attempted.

Because the Chen/Meredith combination do not show a lower blade guard contacting a screw securing the plate, such combination cannot render unpatentable Claim 13. Therefore, this rejection should be overturned and the application allowed.

IX. APPENDICES

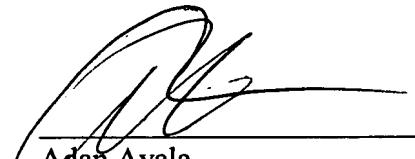
Applicant/Appellant has attached three appendices: (1) the Claims Appendix containing a copy of the claims involved in the appeal; (2) the Evidence Appendix; and (3) the Related Proceedings Appendix.

¹ In view of such teachings contradicting the Examiner's allegations, Applicants/Appellant requested that the Examiner provide documentary evidence showing the existence of the "small tolerance" existing between the plate and the lower guard. *See* MPEP § 2144.03 ("If applicant adequately traverses the examiner's assertion of official notice, the examiner must provide documentary evidence in the next Office action if the rejection is to be maintained.") (*citing* 37 CFR § 1.104(c)(2); *In re Zurko*, 258 F.3d 1379, 1386, 59 USPQ2d 1693, 1697 (Fed. Cir. 2001) ("[T]he Board [or examiner] must point to some concrete evidence in the record in support of these findings" to satisfy the substantial evidence test)). The Examiner failed to provide any documentary evidence or references to support his position.

X. CONCLUSION

Based on the foregoing, Applicant/Appellant urges the Board to rule that Claim 13 is patentable over the Chen/Meredith combination.

Respectfully submitted,



Adan Ayala
PTO Reg. No. 38,373
Attorney for Applicants/Appellant

Appendices attached

CLAIMS APPENDIX

Claim 13. A chop saw comprising:

a base assembly; and

a saw assembly pivotably attached to the base assembly, the saw assembly comprising an upper blade guard, a plate rotatably attached to the upper blade guard, a lower blade guard rotatably attached to the plate, and a screw engaging the upper blade guard for fixing the plate; wherein at least one of the upper blade guard and plate have a first tab disposed near the screw and extending outwardly and substantially perpendicularly to the at least one of the upper blade guard and plate, the first tab extending from the at least one of the upper blade guard and plate a first distance, the screw being required to be moved a second distance longer than the first distance in order to pivot the plate so that the lower blade guard contacts the screw upon rotation of the lower blade guard, wherein the lower blade guard contacts the screw upon rotation of the lower blade guard after the screw has been moved the second distance.

EVIDENCE APPENDIX

No evidence has been submitted pursuant to 37 CFR 1.130, 1.131, or 1.132 or entered by the examiner that is relied upon by appellant in the present appeal.

RELATED PROCEEDINGS APPENDIX

There are no currently pending appeals, interferences, or judicial proceedings related to the present case.